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In the Supreme Court of the United States

No. 05-51

MARIO A. BUSTILLO, PETITIONER

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS

04-10566

MOISES SANCHEZ-LLAMAS, PETITIONER

v.

STATE OF OREGON

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA
AND THE SUPREME COURT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case involves the questions whether Article 36 of the Vienna Convention on Consular Relations (Vienna Convention), April 24, 1963, 21 U.S.T. 77, 100-101, 596 U.N.T.S. 261, 292, 294, creates individual rights that may be judicially enforced in a criminal case at the behest of a criminal defendant, and, if so, whether a violation of Article 36's requirement that a detained foreign national be advised of his rights to have consular officials informed of his detention and to communicate with the consular post requires the suppression of a detainee's statements to the police, and whether a State's ordinary principles of waiver and procedural default may preclude a defendant from raising a claim under Article 36 based on the

defendant's failure to raise the claim at trial. The United States has a substantial interest in the interpretation and effect that courts in the United States give to international instruments to which it is a party and therefore has a considerable interest in the resolution of this case. The United States has participated in previous cases raising similar questions. See, *e.g.*, *Medellin* v. *Dretke*, 125 S. Ct. 2088 (2005) (per curiam); *Breard* v. *Greene*, 523 U.S. 371 (1998) (per curiam).

STATEMENT

1. The Vienna Convention

In 1969, with the advice and consent of the Senate, see 115 Cong. Rec. 30,997, the United States ratified the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36 of the Vienna Convention, 21 U.S.T. at 100-101, 596 U.N.T.S. at 292, 294, is designed to "facilitat[e] the exercise of consular functions relating to nationals of the sending State." Toward that end, Article 36 provides that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." *Id.*, art. 36(1)(a).

Article 36 further provides that "[i]f [a foreign detainee] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Vienna Convention, art. 36(1)(b). In addition, "[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay." *Ibid.* State authorities "shall inform the person concerned without delay of his rights under [Article 36(1)(b)]." *Ibid.*

Article 36 also provides that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with

him and to arrange for his legal representation." Vienna Convention, art. 36(1)(c). It specifies that consular officers also "have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment." *Ibid.* At the same time, it provides that "consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action." *Ibid.*

The rights referred to in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State." Vienna Convention, art. 36(2). That requirement is "subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *Ibid.*

At the time the United States ratified the Vienna Convention, it also ratified an Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (Optional Protocol), Apr. 24, 1963, 21 U.S.T. 77, 325, 596 U.N.T.S. 487. Parties to the Optional Protocol may submit "[d]isputes arising out of the interpretation or application of the Convention" for resolution by the International Court of Justice (ICJ). Optional Protocol, art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. Like all decisions of the ICJ, however, decisions in cases submitted to the ICJ under the Optional Protocol have "no binding force except between the parties and in respect of that particular case," Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, 1062. On March 7, 2005, the United States noticed its withdrawal from the Optional Protocol. See *Medellin* v. *Dretke*, 125 S. Ct. 2088, 2101 (2005) (O'Connor, J., dissenting).

2. State Court Proceedings

a. *Bustillo, No. 05-51.* (1) On the night of December 10, 1997, James Merry was struck in the head by a young man wielding a baseball bat while standing outside a Popeyes Res-

taurant in Springfield, Virginia. Merry later died as a result of his injuries. Based on the statements of several witnesses to the attack, Bustillo, a Honduran national, was arrested and charged with murder. 05-51 Pet. App. 39a; 05-51 Br. in Opp. 4. The arresting authorities did not inform Bustillo that he could have the Honduran consulate informed of his detention if he so desired. 05-51 Br. in Opp. 4.

At trial, several prosecution witnesses identified Bustillo as the one who struck Merry with the bat. One of the witnesses knew Bustillo from classes they had together at school; the others separately identified him from a photo spread. Shortly before the attack, Bustillo and other members of his street gang had confronted Merry inside the restaurant while he was eating dinner with the three individuals who later identified Bustillo as Merry's killer. The witnesses recalled that Merry's attacker had been wearing a red shirt, as had Bustillo that evening. 05-51 Pet. App. 39a; 05-551 Br. in Opp. 2-5.

The defense's theory was that Merry's attacker was another individual known as "Sirena." A member of Bustillo's gang stated that he saw a man he knew as "Julio" or "Sirena" approach Merry and strike him with a bat, and a woman who was standing next to Merry when he was struck testified that Bustillo was not the assailant although she did not know who the attacker was. 05-51 Pet. App. 31a-32a. Another witness testified that she had seen "Sirena," whose last name she did not know, on a plane to Honduras the day after Merry died. 05-51 J.A. 205. The jury found Bustillo guilty of first-degree murder, and he was sentenced to imprisonment for a term of 30 years. 05-51 Pet. App. 19a.

(2) Bustillo, who was represented by counsel, did not object at trial that the State had failed to inform him that he could contact his consulate, nor did he raise the issue in his post-trial motion to set aside the jury's verdict or on appeal. 05-51 Pet. App. 47a. On direct review, Virginia's intermediate appellate court affirmed Bustillo's conviction and sentence,

Bustillo v. *Commonwealth*, No. 2321-98-4, 2000 WL 365930 (Va. Ct. App. Apr. 11, 2000) (unpublished), and the Supreme Court of Virginia refused a petition for further appeal, J.A. 9. This Court denied Bustillo's petition for certiorari. *Bustillo* v. *Virginia*, 532 U.S. 1072 (2001).

Following direct review, Bustillo petitioned for state habeas corpus relief, alleging for the first time that his right to consular notification under the Vienna Convention had been violated and that he was entitled to reversal of his conviction as a result. 05-51 Pet. App. 40a. Alternatively, Bustillo argued that his retained trial counsel was ineffective in failing to advise Bustillo of his right to consult with the Honduran consulate. *Id.* at 47a. The state habeas court denied Bustillo's Vienna Convention claim without addressing the merits. The court ruled that the claim was procedurally barred by Bustillo's failure to assert it "during trial and through the appellate process." *Id.* at 43a. The court also held that Bustillo's Vienna Convention-based ineffectiveness claim was procedurally barred. *Id.* at 47a. The habeas court granted Bustillo an evidentiary hearing on the separate question whether the prosecutor failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). 05-51 Pet. App. at 48a. Although the court found that the evidence was exculpatory, *id.* at 34a-35a, it determined, after a second hearing, that Bustillo's defense had not been prejudiced and denied the habeas petition, *id.* at 15a-16a.

The Supreme Court of Virginia refused a petition for appeal, ruling that Bustillo had not properly perfected his appeal with respect to the *Brady* claim and that "there is no reversible error" with respect to the Vienna Convention claim. 05-51 Pet. App. 1a; 05-51 Br. in Opp. 11. This Court granted certiorari limited to the Vienna Convention issue. See 126 S. Ct. 621 (2005).

b. *Sanchez-Llamas, No. 04-10566.* (1) Sanchez-Llamas, a Mexican national, was arrested in December 1999 after an exchange of gunfire with police officers, in which he wounded

one officer in the leg. 04-10566 Pet. App. 15. Shortly after Sanchez-Llamas's arrest, officers apprised him in both English and Spanish of his *Miranda* rights, which he waived. *Id.* at 15 & n.2. The officers did not additionally inform Sanchez-Llamas that he could request that the Mexican consulate be notified of his detention. *Ibid.* During questioning, Sanchez-Llamas made incriminating statements. *Id.* at 16. He was thereafter charged with attempted murder, attempted aggravated murder, and various other crimes. *Ibid.*

Before trial, Sanchez-Llamas moved to suppress evidence of his post-arrest statements on the ground that he "was not advised of his right to consult with the Mexican Counsel." 04-10566 Pet. App. 3. The trial court denied Sanchez-Llamas's suppression motion, ruling that a violation of the Vienna Convention does not require the suppression of the defendant's incriminating statements as a remedy. *Id.* at 10. Sanchez-Llamas was thereafter convicted of 11 felony counts and sentenced to imprisonment for 246 months. *Id.* at 16.

(2) The Oregon Supreme Court affirmed. In rejecting Sanchez-Llamas's Vienna Convention claim, the court recognized "the general rule * * * that rights created by international treaties belong to the signatory state and are *not* enforceable in American courts by private individuals," absent "a specific intent to create such [enforceable] individual rights [that] can be discerned from the treaty as a whole." 04-10566 Pet. App. 18. Although "Article 36 expressly refers to the detained foreign national's 'rights' to consular access and notification," the court stated that Article 36's "mere use of the term 'rights' cannot, by itself, support an intent to require signatory states to allow individual detainees to enforce those 'rights' in a criminal proceeding against them—particularly when the treaty does not specify the nature of the declared 'rights' or any remedy that is required for their breach." *Id.* at 20-21. The Oregon Supreme Court found it more likely that the Convention's drafters had used the phrase informing a prisoner of his "rights" as a shorthand "way of describing

what [information] a receiving signatory state must tell a foreign detainee." *Id.* at 21. This interpretation was bolstered, the court continued, by language in both the treaty's preamble and Article 36's introductory clause suggesting that "the treaty and Article 36 are concerned with relationships and obligations among *nations*, not with individual rights." *Ibid.*

Absent any "clear intention" that would negate the general presumption against enforcement of treaty provisions by private individuals, the Oregon Supreme Court concluded "that the obligations that Article 36 describes are enforceable only by the affected signatory states and not by individual detainees." 04-10566 Pet. App. 22. The court therefore rejected Sanchez-Llamas's claim that his statements should be suppressed as a consequence of the Vienna Convention violation. *Id.* at 22-23. The Oregon Supreme Court declined, as a matter of discretion, to address Sanchez-Llamas's claim that the waiver of his *Miranda* rights was not voluntary. *Id.* at 15 n.2. This Court granted a petition for certiorari on the questions whether the Vienna Convention confers an individually enforceable right and, if so, whether suppression is the proper remedy for such a violation. See 126 S. Ct. 621 (2005).

SUMMARY OF ARGUMENT

1. Article 36 of the Vienna Convention on Consular Relations does not create an individually enforceable right that a criminal defendant may assert to attack his conviction and sentence or to suppress evidence. Article 36 requires parties to the Convention to notify a detained foreign national that he may request consular assistance. But the text does not authorize private enforcement of that provision in court. It has long been established that, absent a clear indication to the contrary, an international treaty is addressed solely to the rights of States and not private individuals; that is particularly true of a treaty that bears on sovereign conduct and the relations between States. The Vienna Convention reflects that understanding in express terms in its preamble, and

again in Article 36, by confirming that the Convention is intended to facilitate the provision of consular services, not to create individual rights. Nothing in the Vienna Convention's text or history overrides that understanding or justifies recognizing a novel, judicially enforceable right of an individual to assert a violation of Article 36 in a criminal prosecution.

Any suggestion that the parties to the Convention intended, by its adoption, to create such a judicially enforceable individual right is contradicted by the historical context in which the Vienna Convention was approved, as well as by the 40 years of practice under it. Neither petitioners nor their amici offer a single unambiguous example in the 40-year history of the Vienna Convention from any of its 161 parties of an individual defendant being afforded a remedy in his criminal case on the basis of a Vienna Convention violation. And the Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence. That clearly expressed view of the Executive Branch on the meaning of a treaty "is entitled to great weight." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) (quoting *Sumitomo Shojo Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)).

Against all of that, the reasoning of the International Court of Justice in *Avena and other Mexican Nationals (Mexico* v. *United States)* (*Avena*), 2004 I.C.J. 12 (Mar. 31), that the Vienna Convention creates judicially enforceable individual rights should, after "respectful consideration," *Breard* v. *Greene*, 523 U.S. 371, 375 (1998) (per curiam), be rejected. The United States is obligated to comply with the judgment in that case, and the President has acted to ensure such compliance. But the United States has no obligation to accept the reasoning underlying that judgment, or to apply it in other cases. The ICJ's reasoning in *Avena* lacks sufficient support in the basic rules of treaty interpretation and contradicts the intention and practice of the parties to the Convention. The responsibility for interpreting the Convention as a

matter of United States law rests with this Court and with the Executive Branch, whose views are due great deference, and the relevant legal principles and evidence establish that the ICJ's interpretation is incorrect.

2. Even assuming that a receiving State's failure to comply with the Convention's consular notification provisions could give rise to an individually enforceable right, suppression in state court of a detainee's voluntary confession, given after a valid waiver of *Miranda* rights, would not be an appropriate remedy. The Court has no authority to impose an exclusionary rule on the States as an exercise of the Court's supervisory authority. *Dickerson* v. *United States*, 530 U.S. 428, 438 (2000). Because there is no assertion that the Constitution or a federal statute mandates a suppression remedy, if this Court is to require exclusion of evidence as a remedy for a State's violation of Article 36, that rule must be found in the Vienna Convention itself.

There is nothing in the text or history of the Vienna Convention to suggest that its drafters intended suppression of statements made by a foreign national who was not told that he could request consular notification. Indeed, the idea that the drafters would have envisioned suppression of a voluntary confession as a remedy is difficult to square with the fact that, in most nations, the exclusionary rule had not taken root at the time of the Convention's drafting (and, indeed, still has not). Even considering United States practice in particular, the Vienna Convention was drafted years before this Court decided *Miranda* v. *Arizona*, 384 U.S. 436 (1966)—and the Convention was ratified in this country shortly after Congress attempted to overrule *Miranda*. Any suggestion that the Convention implies a suppression remedy because it serves to protect the effective exercise of a detainee's right against self-incrimination cannot withstand scrutiny. Quite apart from the absence of a textual foundation for that position, in many countries, consular officials—and in some countries even the detainee's lawyers—would not be allowed access to a detainee

until after the preliminary period of interrogation is concluded. The drafters, therefore, cannot have had an implicit understanding that the admissibility of a confession would be tied to full compliance with Article 36(1)(a).

3. Finally, even assuming that the Vienna Convention conferred individual rights that are enforceable by defendants in criminal proceedings, nothing in the Convention precludes a State from requiring, as a matter of its procedural rules, that a claimed violation of Article 36 be raised before or during trial. "[R]ights" under Article 36 "shall be exercised in conformity with the laws and regulations of the receiving State," and this Court held in *Breard* that procedural default rules do not prevent "full effect to be given to the purposes for which [Article 36 rights] are intended," as Article 36(2) provides. 523 U.S. at 375. A procedural-default rule does not prevent the purposes of Article 36 from receiving "full effect," any more than it denies full effect to constitutional guarantees that are likewise subject to default. While the President has determined that the United States will comply with the *Avena* judgment by reviewing and reconsidering the convictions and sentences of the 51 Mexican nationals covered by it, notwithstanding state procedural default rules, there is no obligation to accept the ICJ's interpretation of Article 36(2) with respect to other cases, and the Executive Branch does not.

Practical and policy reasons provide no basis for allowing Article 36 claims to be raised on collateral review even if not preserved at trial. Unlike a claim of ineffective assistance of counsel, cf. *Massaro* v. *United States*, 538 U.S. 500 (2003), trial counsel can readily recognize and seek a remedy for Vienna Convention violations, just as counsel does for *Miranda* violations and a host of other claims. The absence of notice to the defendant does not preclude counsel from recognizing a possible legal claim (as the preserved claim in No. 04-10566 demonstrates). And requiring adjudication of Vienna Convention claims at trial would ensure that they could be redressed

in a timely fashion, without the need to upset a final verdict and require a new trial.

ARGUMENT

THE VIENNA CONVENTION DOES NOT PROVIDE A BASIS ON WHICH PETITIONERS MAY CHALLENGE THEIR CRIMINAL CONVICTIONS

I. ARTICLE 36 DOES NOT CONFER INDIVIDUALLY ENFORCEABLE RIGHTS

A. Treaties Are Presumed To Be Enforceable By States, Not By Individuals, Absent A Clear Indication To The Contrary

It is a long-established presumption that treaties and other international agreements do not create judicially enforceable individual rights. As this Court stated in the *Head Money Cases*, 112 U.S. 580 (1884), "[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Id.* at 598. When a treaty violation nonetheless occurs, it "becomes the subject of international negotiations and reclamations," not judicial redress. *Ibid.* See *Charlton* v. *Kelly*, 229 U.S. 447, 474 (1913); *Whitney* v. *Robertson*, 124 U.S. 190, 195 (1888) (issues of compliance with treaty obligations are "not judicial questions"; rather, "the power to determine these matters ha[s] not been confided to the judiciary * * * but to the executive and legislative departments of our government; * * * they belong to diplomacy and legislation, and not to the administration of the laws"); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 306 (1829).

Treaties can, and on occasion do, create judicially enforceable private rights. But since such treaties are the exception, rather than the rule, there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts. *United States* v. *Emuegbunam*, 268

F.3d 377, 389-390 (6th Cir. 2001), cert. denied, 535 U.S. 977 (2002); *United States* v. *Jimenez-Nava*, 243 F.3d 192, 195-196 (5th Cir.), cert. denied, 533 U.S. 962 (2001); *United States* v. *De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001); *United States* v. *Li*, 206 F.3d 56, 61 (1st Cir.), cert. denied, 531 U.S. 956 (2000). That background principle applies even when a treaty benefits private individuals. "International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." 2 Restatement (Third) of the Foreign Relations Law of the United States (Restatement (Third) of Foreign Relations) § 907 cmt. a, at 395 (1987).

For example, in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Court held that two conventions did not create judicially enforceable rights for ship owners, even though one specified that a merchant ship "shall be compensated for any loss or damage" in certain circumstances, and the other specified that "[a] belligerent shall indemnify the damage caused by its violation." *Id.* at 442 & n.10 (citations omitted). The Court explained that the conventions "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs." *Id.* at 442. Even though the agreements referred to "compensation" for the private party and a State's obligation to "indemnify," that language did not overcome the presumption against treaties creating privately enforceable rights: "They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Ibid.* See *Johnson* v. *Eisentrager*, 339 U.S. 769, 789 & n.14 (1950) (protections of the Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 U.N.T.S. 343, are not judicially enforceable). Like the agreements at issue in *Amerada Hess*, Article 36 may benefit a detained foreign national, but it does not give that individual a private right to challenge his conviction and sentence based on an alleged denial of consular information. See *Jimenez-*

Nava, 243 F.3d at 195-198; *Emuegbunam*, 268 F.3d at 391-394; see also *De La Pava*, 268 F.3d at 163-165; *Li*, 206 F.3d at 66-68 (Selya, J. and Boudin, C.J., concurring).

The cases petitioners cite (05-51 Pet. Br. 18-19 n. 3; 04-10566 Pet. Br. 30-31 n.11, 33-34 n.13) in which the Court has given effect to self-executing treaty provisions at the behest of private individuals are readily distinguishable from the present context. Most of those cases involve explicit treaty provisions that guarantee to individual aliens freedom to exercise such peculiarly private rights as the ability to enter into contracts, engage in commerce, or own, devise, or inherit property on the same basis as United States citizens.[1] In light of the inherently private nature of the rights at issue and the explicit language of the agreements, the courts gave effect to the self-executing treaty provisions over inconsistent state laws. See *Head Money Cases*, 112 U.S. at 598-599 (noting that courts will enforce treaty provisions that "regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property" when these "are of a nature to be enforced in a court of justice"). The affirmative obligation of the receiving State under Article 36 of the Vienna Convention to provide information to detainees—an obligation that, when respected, may still result in the sending State providing no response or assistance whatever to the detainee—is plainly of a different order from the commercial and property rights afforded by those treaties.

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[1] See, *e.g.*, *Kolovrat* v. *Oregon*, 366 U.S. 187, 191 n.6 (1961) (treaty provision guaranteeing that "[i]n all that concerns the right of acquiring * * * property, * * * Serbian subjects * * * shall enjoy the rights which the respective laws grant * * * the subjects of the most favored nation" preempted Oregon law limiting foreign nationals' right to inherit property); *Asakura* v. *Seattle*, 265 U.S. 332, 340-342 (1924) (bilateral treaty providing that "subjects of [Japan] shall have liberty" to engage in trade "upon the same terms as native citizens" of the United States preempted local ordinance precluding aliens from obtaining a business license); *Jordan* v. *Tashiro*, 278 U.S. 123, 128 (1928) (same).

In other instances, foreign nationals have been allowed to defend against criminal prosecution in light of specialty rules in extradition treaties. See, *e.g.*, *United States* v. *Rauscher*, 119 U.S. 407, 419-424 (1886); *Johnson* v. *Browne*, 205 U.S. 309, 320-321 (1907). As the Court explained in *United States* v. *Alvarez-Machain*, 504 U.S. 655 (1992), *Rauscher* and *Browne* applied the rule of specialty "because of the practice of nations with regard to extradition treaties," and "any doubt" concerning a fugitive's ability to seek judicial enforcement of the treaty-conferred rule of specialty "was put to rest by two federal statutes which imposed the doctrine of specialty upon extradition treaties to which the United States was a party." *Id.* at 660, 667. There is no similar history of enforcement of obligations such as those undertaken in Article 36 and there is no federal statute that purports to make the Article judicially enforceable.

The conclusion that individual defendants cannot rely on the Vienna Convention to attack their convictions is fully consistent with the accepted understanding that the Vienna Convention is self-executing. See S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 5 (1969). The Vienna Convention is self-executing in the sense that government officials can provide foreign nationals with information about consular assistance and access to consular officers without the need for implementing legislation and can further give effect to provisions that were intended to be judicially enforced, such as those relating to consular privileges and immunities.[2] But it is a separate question

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[2] See, *e.g.*, *Risk* v. *Halvorsen*, 936 F.2d 393, 397 (9th Cir. 1991) (finding consular officer immune under Vienna Convention, art. 43(1), 21 U.S.T. at 104, 596 U.N.T.S. at 298, because duties were consular functions), cert. denied, 502 U.S. 1035 (1992); *Gerritsen* v. *de la Madrid Hurtado*, 819 F.2d 1511, 1515-1516 (9th Cir. 1987) (recognizing the enforceability of the consular immunity provision of the Convention, but finding that the criminal actions at issue did not qualify for immunity). That consular immunity can be judicially enforced is consistent with established law that formed the backdrop for the Vienna Convention. See, *e.g.*, *Davis* v. *Packard*, 32 U.S. (7 Pet.) 276, 284 (1833); *Wacker* v. *Bisson*, 348

whether Article 36 gives a foreign national an affirmative right to challenge his conviction and sentence on the ground that consular access was denied. 1 Restatement (Third) of Foreign Relations Law § 111 cmt. h, at 47 ("[w]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."). Such an action does not represent simple reliance on a legal protection as a defense, see 04-10566 Pet. Br. 28, but represents an affirmative use of the treaty to upset a final conviction. As discussed below, the available evidence shows that Article 36 does not confer such a right.

The question whether a private individual has a judicially enforceable right is also distinct from the question whether the United States could seek judicial relief in the event that state officials failed to provide a foreign national access to consular officers as required by the Vienna Convention. Under longstanding principles, the United States could bring an action in court to enforce compliance with a treaty obligation. See *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925) (Holmes, J.) (United States has authority to sue "to carry out treaty obligations to a foreign power"; "The Attorney General by virtue of his office may bring [such a] proceeding and no statute is necessary to authorize the suit."). The inherent authority of the United States to bring an action stems from the constitutionally grounded primacy of the national government in the realm of foreign affairs and the need

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F.2d 602, 609 n.19 (5th Cir. 1965); *Sarelas* v. *Rocanas*, 311 F.2d 36, 38 (7th Cir. 1962), cert. denied, 373 U.S. 949 (1963); *Anderson* v. *Villela*, 210 F. Supp. 791, 792 (D. Mass. 1962); *Waltier* v. *Thomson*, 189 F. Supp. 319, 320 (S.D.N.Y. 1960). The Vienna Convention thus did not create consular immunity, but simply carried forward an established understanding. By contrast, there was no established practice that consular notice and access—like that treated in Article 36—could be individually enforced in court. Indeed, there appears to have been no practice in international law before Article 36 of a detainee being allowed to attack a criminal conviction based on any ground related to a failure of consular notification, communication, or access.

for the United States to be able to effectuate treaty obligations and speak with one voice in dealing with foreign nations. See *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-414, 424 (2003). No similar principle confers a general right to enforce treaties on private individuals. Moreover, judicial action initiated or supported by the Executive to enforce a treaty obligation or ameliorate a breach is quite different from a recognition of judicially enforceable rights—with attendant potential complications for United States foreign policy—over the objection of the Executive.

B. The Language And Structure Of The Vienna Convention Confirm That It Does Not Create Privately Enforceable Rights

Article 36(1)(b) of the Vienna Convention specifies that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested." 21 U.S.T. at 101, 596 U.N.T.S. at 292. In addition, "[a]ny communication addressed to the consular post by the person arrested, * * * shall also be forwarded * * * without delay." *Ibid.* Finally, "authorities [of the receiving State, *i.e.*, of the United States] shall inform the person concerned without delay of his rights under [Article 36(1)(b)]." *Ibid.*

The only violation of Article 36(1)(b) that petitioners assert is that they were not informed that they could request that their consulates be notified of their detention. Petitioners contend (05-51 Pet. Br. 21-22; 04-10566 Pet. Br. 15-16) that a violation of this obligation infringes an individual right of the detainee, which may be vindicated in court, based in large part on the fact that Article 36(1)(b) refers to the detainee's "rights." Yet, the "rights" enumerated in Article 36(1)(b) do not encompass notice to the detainee; the provision places only a *duty* on the receiving State to give notice to the

detainee about consular access. And the failure to fulfill that duty is the only violation alleged here.[3]

Even where the Convention does use the term "right," that usage does not signify an individual right that can be privately enforced through judicial process. The discussions of the International Law Commission (ILC) in drafting its proposed Article 36 (submitted by the ILC to the United Nations Conference) reflect that the proposal "related to the basic function of the consul to protect his nationals vis-à-vis the local authorities." *Summary Records of the 535th Meeting*, [1960] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1960. The Article's proponent, Sir Gerald Fitzmaurice, specifically warned that "[t]o regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue," *id.* at 49; rather, the procedural provisions of Article 36 "were intended to provide a consul with the means of carrying out the function of protection," *ibid.* See *ibid.* (Mr. Erim agreed "that the proposed new article * * * dealt with the rights and duties of consuls and not with the protection of human rights or the status of aliens"). Thus, although the ILC experts referred to "the right of * * * nationals of access to [the consul]," that "right" was in

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[3] Plainly, the receiving State's obligation under Article 36(1)(b) to "inform the person * * * of his rights under this sub-paragraph" refers to the "rights" addressed in the preceding two sentences: (1) to have consular officials of the sending State notified of his detention and (2) to have communications forwarded to the consular post. Neither petitioner maintains that he was affirmatively prevented from having his consul notified or otherwise communicating with his consulate. Petitioners also cite in support of their argument (05-51 Pet. Br. 23; 04-10566 Pet. Br. 15-16) paragraph (2) of Article 36, which provides that "[t]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State." Once again, the term "rights" in this sentence does not refer to the receiving State's duty to provide a detainee with information about consular access, which could not in any meaningful sense be "exercise[d]" by the detainee, but instead to the underlying "rights" of notification and communication.

service of the consul's ability to "carr[y] out effectively" his duties. *Ibid.* Indeed, the ILC drafters stated their view that "where a country did not carry out a provision of a convention, it would naturally be estopped from invoking that provision against other participating countries," *ibid.*, an understanding that, whether accurate or not, was clearly at odds with any supposed intent to create an enforceable individual right.

The subsequent debate between governmental delegates to the United Nations Conference convened to negotiate the Convention is to a similar effect. There was some disagreement among the delegates whether Article 36 should require mandatory notification to consular authorities or not require any affirmative step by the receiving State. 1 Official Records, United Nations Conference on Consular Relations, Vienna, 4 Mar. - 22 Apr. 1963, at 81-86, 336-340 (1963) (U.N. Official Records). Numerous delegations objected, both in the second committee session and the plenary meeting, to the burden on the receiving State of requiring notification to the consulate in all instances. *Id.* at 36-38 (Thailand, United Arab Republic (*i.e.*, Egypt), Japan, France), 82-83 (Egypt, Canada, Ceylon), 337-340 (Japan, France, Republic of Korea, Republic of Viet Nam, Thailand). Eventually, the Conference adopted a compromise offered by twenty countries, including many of those who had objected to the burden of mandatory notification. See *id.* at 82. As the Egyptian delegate explained, the mandatory notification provision was changed to provide for notification upon request of the detainee not with an intent to enshrine in the treaty an individual right, but "to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which receive many tourists and visitors," and would ensure "that the authorities of the receiving State would not be blamed if, owing to pressure or work or other circumstances,

there was a failure to report the arrest of a national to the sending State." *Ibid.*[4]

Other provisions of the Vienna Convention confirm that the Convention adheres to the traditional understanding that the agreement is intended for the benefit of the State parties, not private individuals. The Convention's preamble states that "the purpose of [the] privileges and immunities [identified in the treaty] is not to benefit individuals, but to ensure the efficient performance of functions by consular posts." 21 U.S.T. at 79, 596 U.N.T.S. at 262. Although petitioners read the preamble to refer only to provisions in the Convention that define the privileges and immunities of consular officials (05-51 Pet. Br. 32-33, 04-10566 Pet. Br. 17-19), and thus not to the "rights" in Article 36, Article 36's introductory clause itself makes clear that that provision as well was designed "[w]ith a view to *facilitating the exercise of consular functions* relating to nationals of the sending State." Vienna Convention, art. 36(1) (emphasis added). As the preamble and Article 36's introductory clause show, "the purpose of Article 36 was to protect a *state's right* to care for its nationals." *De La Pava*, 268 F.3d at 165.

Equally striking, there is no indication in the Vienna Convention that the "rights" referred to in Article 36(1)(b) may be privately enforced. To the contrary, the remedies for a violation of the "rights" referred to in Article 36(1)(b) are the traditional means by which international disputes are resolved. A foreign national's government may protest the failure to

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[4] Although the United States delegate stated in connection with the amendment that it was intended "to protect the rights of the national concerned," 1 U.N. Official Records 337 (para. 39) (statement of the United States delegate), Bustillo errs (05-51 Pet. Br. 24-27) in relying on that statement. The "rights" to which the American delegate referred were not rights created by treaty, but "rights" that existed wholly independent of the draft convention, *i.e.*, "the freedom of action of the detained persons who might not wish their consulate to be informed," such as those seeking asylum, 1 U.N. Official Records 38 (para. 21).

observe the terms of Article 36 and attempt to negotiate a solution. The governments of both Mexico and Honduras have, in fact, presented their concerns about the treatment of petitioners through diplomatic channels, and the United States has apologized for its failure to fulfill its Vienna Convention undertaking.

If traditional diplomatic channels fail to provide a satisfactory resolution, the Optional Protocol establishes a mechanism that States may choose for resolving disputes through "judicial" means. Indeed, the United States has previously sought resolution of such disputes by the ICJ, as have other States who challenged the United States' compliance with its Vienna Convention obligations. By its express terms, however, the judicial mechanism provided by the Optional Protocol is voluntary. Some sixty percent of signatories to the Vienna Convention do not subscribe to the Optional Protocol, and the United States noticed its withdrawal in March 2005. Only State parties, and not their nationals, may initiate ICJ proceedings. Moreover, even when the ICJ has jurisdiction, its ruling "has no binding force except between the parties and in respect to that particular case," Statute of the ICJ, art. 59, 59 Stat. 1062, and no individual is or can be "party" to a proceeding under the Optional Protocol. The express provision of a limited and optional international judicial forum for resolving Vienna Convention disputes further supports the conclusion that the Vienna Convention did not, *sub silentio*, create individual rights that were intended to be enforceable by private individuals in domestic criminal proceedings.

The structure of Article 36 confirms that understanding. The first protection extended is to consular officers, not to individual nationals: Article 36(1)(a) specifies that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." The "rights" of foreign nationals were deliberately placed underneath, 1 U.N. Official Records 333 (Chilean delegate), signaling what the introductory clause spells out - that the function of Article

36(1)(b) is not to create freestanding individual rights but to facilitate a foreign state's right to protect its nationals. And on a practical level, a foreign national's rights are necessarily subordinate to, and derivative of, his country's rights. An individual may ask for consular assistance, but it is entirely up to the sending State whether to provide it.

Petitioners contend (05-51 Pet. Br. 23; 04-10566 Pet. Br. 16) that Article 36's reference to the detainee's "request[]" for notification of his consulate is proof that the Article was intended to confer an individual right, rather than to facilitate consular affairs. To the contrary, as noted above, see p. 18, *supra*, the Egyptian delegate explained that the move away from mandatory notice to the sending state was an attempt to reduce the burden on the receiving State. Although some delegates also expressed concern for the privacy interests of detainees who might not want their home governments to know of their detention, there was no indication that they understood the shift from mandatory notification to create a privately enforceable individual right. Notably, if a country prefers automatic notice whenever one of its nationals is detained, it may negotiate for such an agreement. In fact, the United States has bilateral agreements with some 58 States that are party to the Vienna Convention pursuant to which the governments will notify each other of a national's detention irrespective of the individual's wishes. See A553 (State Department guidance that "[i]f the alien is from a 'mandatory notification' country, notification must be given even if the alien objects"); A53 (listing 58 "Mandatory Notification Countries," including the United Kingdom, China, and Russia).[5] Under petitioners' view, the Vienna Convention, by bestowing upon individual foreign nationals a personal right to decide whether "to have his consulate notified or not" (05-51 Pet. Br.

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[5] All citations to "A___" are to the Annexes to the Counter-Memorial of the United States in *Avena*. The United States proposes to lodge the Counter-Memorial and Annexes with the Court, if the Court so desires.

23; 04-10566 Pet. Br. 16), would supersede any previous agreement that was inconsistent with such an individual right. See *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam) (noting later-in-time rule). Yet the United States continues to recognize and enforce mandatory notification agreements that were entered into before the Vienna Convention. See A581 (recognizing continuing effect of agreements with the United Kingdom and U.S.S.R. that entered into force before the Vienna Convention became effective for the United States).

C. The Vienna Convention's Ratification History And Its Construction By The Executive Branch Confirm That It Was Not Understood To Have The Radical Effect Of Creating Individual Rights

The ratification history provides further evidence that Article 36 does not create private rights that may be enforced in a criminal proceeding in the domestic courts of the United States. See *United States* v. *Stuart*, 489 U.S. 353, 366 (1989) (ratification history is relevant in interpreting treaty); *id.* at 373 (Scalia, J., concurring) (accepting resort to extratextual sources "when a treaty provision is ambiguous"). At the time of ratification, the State Department informed the Senate that "[t]he Vienna Consular Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." S. Exec. Rep. No. 9, *supra*, at 18. The Senate Foreign Relations Committee, in turn, cited as a factor in its endorsement of the treaty that "[t]he Convention does not change or affect present U.S. laws or practice." *Id.* at 2. And, following ratification, the State Department wrote a letter to all 50 governors explaining it would not require "significant departures from the existing practice within the several states of the United States." *Li*, 206 F.3d at 64. That series of statements could not have been made if the Convention were understood to give a criminal defendant a private right to challenge his conviction and sen-

tence on the ground that he was not informed as required by Article 36. See Letter from David R. Andrews, Legal Adviser, Department of State, to James K. Robinson, Assistant Attorney General, Criminal Division, U.S. Department of Justice, Re: *United States* v. *Li*, No. 97-2034 (1st Cir.) (Oct. 15, 1999) (*Li* Letter); *id.* Attach. A, Department of State Answers to the Questions Posed by the First Circuit in *United States* v. *Nai Fook Li* at A9 (State Department Answers).[6]

Of particular significance is the fact that the Executive Branch does not view the Vienna Convention as creating a right for a criminal defendant to challenge his conviction. The Executive Branch's interpretation of an international treaty "is entitled to great weight." *Stuart*, 489 U.S. at 369 (quoting *Sumitomo Shojo Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)). The Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence. The United States advised the Court of that interpretation in its brief (at 18-23) in *Breard* v. *Greene*, 523 U.S. 371 (1998) (per curiam) (No. 97-8214), and the State Department's Answers to the First Circuit's questions in *Li* confirmed that the State Department had consistently taken that position since the first time the issue was raised by foreign governments in the early 1990s. State Department Answers at A1. Most recently, that view was reiterated in the Brief for the United States in *Medellin* v. *Dretke*, 125 S. Ct. 2088 (2005) (per curiam) (No. 04-5928).

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[6] The State Department Answers and the *Li* Letter are reprinted in Consular and Judicial Assistance and Related Issues: Consular Notification and U.S. Criminal Prosecution: *United States* v. *Nai Fook Li* and *United States* v. *Lombera-Camorlinga*, *2000 Digest* chap. 2(A)(1), at 25-43 and is also available at <*http://www.state.gov/documents/organization/7111.doc*>.

D. The Implementation Of Article 36, Both In The United States And Abroad, Belies An Individual-Rights Interpretation

The ratification history and the State Department's interpretation accord with both the United States' own practice in enforcing the Vienna Convention and the practice of other parties to the Convention. See *Stuart*, 489 U.S. at 366 ("subsequent operation" of treaty is relevant in interpreting it). As the Vienna Convention on the Law of Treaties reflects, treaties should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340.[7] "[T]ogether with the context," treaty interpretation must take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." *Id.*, art. 31(3)(b), 1155 U.N.T.S. at 340.

The State Department's longstanding practice has been to investigate a country's complaint about the absence of notification. When a violation has been confirmed, the Department has extended a formal apology to that country's government and sought to prevent a recurrence through educational efforts. State Department Answers A3. It is the Department's understanding that "this is how consular notification issues have always been handled by the United States under all of the consular conventions to which it is a party, and in situations governed by customary international law." *Id.* at A2-A3. In cases involving the death penalty (and in one other context), the Department has also requested that the violation be

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[7] Although the United States has not ratified the Vienna Convention on the Law of Treaties, the United States generally recognizes the Convention as a valuable guide to principles of treaty interpretation. See, *e.g.*, *Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), cert. denied, 534 U.S. 891 (2001).

considered in clemency.[8] Likewise, in cases of American citizens detained abroad, United States consular officers "raise[] concerns about failures of consular notification through diplomatic channels or directly with the law enforcement officials concerned." *Id.* at A2. Thus, although the State Department "sets a very high standard of assistance" for American citizens detained abroad and aggressively addresses matters of Article 36 compliance, United States consular officers "do not seek judicial remedies for failures of consular notification" in the host country's criminal justice system, and the Department is "unaware of any instance in which the United States has asked a foreign court to undo a criminal proceeding based on a failure of consular notification." *Id.* at A5.

The State Department's experience abroad has been that foreign governments also usually address complaints about the failure of notification by investigating and extending apologies where appropriate. State Department Answers at A3.

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[8] The United States has also taken substantial measures to implement the Vienna Convention obligation to advise detained foreign nationals that they may contact their consuls. The State Department publishes and has placed on a public website <http://travel.state.gov/law/consular/consular_636.html>, "Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," including 24-hour contact telephone numbers that law enforcement personnel can use to obtain advice and assistance. The Department also publishes the "Instructions" as a Consular Notification and Access Manual, publishes a Consular Notification Pocket Card for police pocket use that has suggested advisories for complying with the Vienna Convention and other consular conventions, publishes a 2-foot by 3-foot wall poster that police can post in their facilities containing the consular notification advisory in many languages (Arabic, Chinese, Cambodian, Creole, English, Farsi, French, German, Italian, Japanese, Korean, Lao, Polish, Portuguese, Russian, Spanish, Thai, and Vietnamese) <http://travel.state.gov/law/info/info_626.html>, and makes a training video available. The State Department regularly communicates with the States and law enforcement authorities about ensuring compliance with the consular notification requirements of the Convention.

As of 1999, the Department was not aware of any foreign country that had remedied failures of notification through the criminal justice process. *Id.* at A1, A8. While the Convention has been in force for more than four decades, surveys of foreign decisions have uncovered only a handful of decisions that even touch on the issue, even though 161 countries are now parties to the Vienna Convention. None of these cases has unambiguously endorsed a judicially enforceable individual right to attack a conviction.[9] Notably, briefs amici curiae have

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[9] Petitioners do not cite a single instance in which they contend that a foreign state has afforded recognition of an individual right under Article 36(1)(b) in the context of a criminal prosecution. Bustillo cites no example at all of foreign courts applying Article 36, and Sanchez-Llamas cites (04-10566 Pet. Br. 28) only *Khadr* v. *Canada (Minister of Foreign Affairs)* [2005] 2 F.C.R. D-25 (Can. Fed. Ct. 2004), a case in which a Canadian national detained at Guantanamo Bay sought to compel Canada to provide consular assistance based upon Canada's purported promise of such assistance in a guide published for Canadians abroad.

Neither do the foreign cases cited by petitioners' amici indicate a foreign practice of giving judicial recognition to individual rights under the Vienna Convention in the context of criminal prosecutions. See Former U.S. Diplomats Amici Br. 20-21 (citing a German case, Judgment of 7 Nov. 2001, BGHSt 5, 116 (A1956), which rejected a motion to exclude on the ground that the Vienna Convention conferred no privileges beyond those accorded to Germans, and a Canadian case, *R.* v. *Partak*, 2001 C.C.C. Lexis 312 (Ont. Super. Ct. of J. Oct. 31, 2001) (A1964), which seems only to have assumed the existence of a judicially cognizable right and declined to suppress statements); Nat'l Ass'n of Crim. Def. Lawyers (NACDL) Amici Br. 21-22 (citing *R.* v. *Van Axel*, (Snaresbrook Crown Ct. May 31, 1991) (A2006) and *R.* v. *Bassil*, (Acton Crown Ct. July 28, 1990) (A2008), in which the same British trial judge noted the lack of consular notification, but appears to have suppressed confessions based on the way in which consular notification requirements were incorporated into domestic British statutory law and the fact that the defendants, who spoke little English and were held incommunicado, might not to have understood their rights); NACDL Amici Br. at 19-20 & n.18 (citing three Australian decisions, *R.* v. *Tan* [2001] WASC 275 (W. Austl. Sup. Ct.) (unreported); *R.* v. *Su* [1997] 1 V.R. 1 (Sup. Ct. Vict.); and *Tan Seng Kiah* v. *R.* [2001] 10 NTLR 128 (N. Terr. Ct. Crim. App.), all of which discussed suppression of confessions as a matter

been filed in these cases on behalf of 36 nations that are parties to the Vienna Convention. *None* of those countries identifies a single instance in which their courts have recognized a judicially enforceable individual right under the Vienna Convention. State practice thus shows a glaring absence of private judicial remedies in criminal cases for failures of consular notification.

Finally, the government's interpretation of the Vienna Convention is consistent with how the United States has interpreted similar language found in other treaties. For example, the International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention), *opened for signature* Jan. 10, 2000, S. Treaty Doc. No. 49, 106th Cong., 2d Sess. (2000), 2178 U.N.T.S. 229, and the International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention), *opened for signature* Jan. 12, 1998, S. Treaty Doc. No. 6, 106th Cong., 1st Sess. (1999), 2149 U.N.T.S. 284, provide:

> 3. Any person [detained in connection with terrorist financing] shall be entitled to: (a) Communicate without delay with the nearest appropriate representative of [his] State * * * ; (b) Be visited by a representative of that

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of the courts' discretion to exclude evidence based on public policy concerns on account of interrogators' violation of numerous domestic statutes, including a requirement to inform the suspect of his right to an attorney as well as to contact his consulate, *i.e.*, facts under which United States courts would also have excluded the statements pursuant to *Miranda*). Other foreign decisions from the same countries, not cited by petitioners, expressly hold that the Vienna Convention does not confer individual rights. See *Canada* v. *Van Bergen* [2000] 261 A.R. 387, 390 (2000) (A1982, A1986) ("The Vienna Convention creates an obligation between states and is not one owed to the national."); *R.* v. *Abbrederis* (1981) 1 N.S.W.L.R. 530, 543 (Ct. of Crim. App.) (Australia) (A1987, A1995) (Article 36 "is dealing with freedom of communication between consuls and their nationals. It says nothing touching upon the ordinary process of an investigation by way of interrogation.").

State; (c) Be informed of *that person's rights* under subparagraphs (a) and (b).

4. The *rights* referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory in which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

Terrorist Financing Convention, art. 9, paras. 3 and 4, S. Treaty Doc. No. 49, *supra*, at 7-8, 2178 U.N.T.S. at 234 (emphasis added); see also Terrorist Bombings Convention, art. 7 paras. 3 and 4, S. Treaty Doc. No. 6, *supra*, at 7-8, 2149 U.N.T.S. at 287-288. In its transmittal package, the Executive Branch explained that this language "like the Convention as a whole as well as other similar counterterrorism conventions, is not intended to create individual rights of action." S. Treaty Doc. No. 49, *supra*, at X.

E. The International Court of Justice's Decisions Construing The Convention Do Not Overcome The Conclusions Compelled By Principles Of Treaty Interpretation, The Language And Purpose Of The Convention, And Its Implementation History

The principle that the Court should give "respectful consideration" to an international court's interpretation of a treaty, *Breard*, 523 U.S. at 375, does not lead to the conclusion that Article 36 affords an individual a right to challenge his conviction and sentence. Petitioners and their amici rely principally upon two decisions of the ICJ, in *Avena* and the *LaGrand Case* (*Germany v. United States*), 2001 I.C.J. 466 (*Lagrand*) (June 27). In *LaGrand*, the ICJ concluded that "Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in

this Court by the national State of the detained person." *LaGrand*, 2001 I.C.J. para. 77, at 494. That passage does not state that Article 36 gives a foreign national a domestically enforceable private right. Instead, consistent with the position stated in this brief, it states only that, when there has been a denial of a foreign national's Article 36 rights, a State may seek relief from the ICJ if the dispute is subject to that body's jurisdiction.

LaGrand also concluded that, because the United States failed to inform the LaGrand brothers of their rights as required by Article 36(1), its later application of a procedural default rule to refuse to consider their claim of prejudice arising from that breach violated Article 36(2)'s requirement that the laws of the receiving State must enable "full effect to be given to the purposes for which the rights accorded under this article are intended." 2001 I.C.J. para. 91, at 497-498. That conclusion presupposes that either Article 36(1)'s reference to "rights" or Article 36(2)'s "full effect" requirement, or the two together, create an obligation for criminal courts to attach "legal significance" to a violation of Article 36(1) in a criminal proceeding even in the face of contrary domestic-law principles of default. See *ibid.*; *Avena*, 2004 I.C.J. para. 113, at 57. That understanding, however, is inconsistent with the language and structure of Article 36 of the Vienna Convention in its context as well as the understanding and implementation of the parties to the Convention.

While the ICJ's understanding of the Convention's requirements is entitled to respectful consideration, the ICJ does not exercise any judicial power of the United States, and it is ultimately the responsibility of this Court to interpret the Vienna Convention as a matter of federal law. See *Williams* v. *Taylor*, 529 U.S. 362, 378-379 (2000); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58-59 (1982). The United States is obligated under international law to comply with the judgment of the ICJ in any case to which it is a party and the President has taken unprecedented ac-

tion, pursuant to his constitutional and statutory authority, see p. 44 & n. 17, *infra*, to ensure compliance with the ICJ's judgment in *Avena* by determining that the convictions and sentence of the 51 Mexican nationals covered by that judgment receive review and reconsideration. The United States has no obligation to accept the reasoning underlying the ICJ's judgments, however, or to apply that reasoning in other cases. As we have demonstrated, the ICJ's reasoning is inconsistent with principles of treaty construction, including the need to construe treaty terms "in their context," "together with * * * [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention on the Law of Treaties, art. 31(1), (3)(b), 1155 U.N.T.S. at 340. Moreover, the weight to be given an ICJ judgment is at its nadir where, as here, the Executive Branch, whose views on treaty interpretation are entitled to at least "great weight," has considered the ICJ's decisions and determined that its own longstanding interpretation of the treaty is the correct one. Notably, the withdrawal of the United States from the Optional Protocol will ensure that the United States incurs no further international legal obligations to review and reconsider convictions and sentences in light of violations of Article 36 based on the ICJ's interpretation of the Convention. Under these circumstances and in light of the considerations discussed above, this Court should conclude that Article 36 does not give criminal defendant a private right to challenge his conviction and sentence on the ground that Article 36 was breached.[10]

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[10] Although Sanchez-Llamas relies on a "presumption in favor of uniform treaty interpretation," 04-10566 Pet. Br. 28, as a basis for this Court to adopt the ICJ's reasoning in *Avena*, what is notable is the stark *absence* of other countries affording the kind of judicial remedy Sanchez-Llamas seeks. See pp. 26-27, *supra*.

II. THE SUPPRESSION OF EVIDENCE IS NOT AN AVAILABLE REMEDY FOR A VIOLATION OF ARTICLE 36'S CONSULAR NOTIFICATION PROVISION

If the Court confirms the Executive Branch's longstanding interpretation of the Vienna Convention as not creating judicially enforceable rights, its decision need go no further. However, even assuming *arguendo* that Article 36(1)(b) does confer individual rights on foreign national detainees, the violation of those rights would not warrant suppression of statements made by a detainee who was not informed about his right to contact his consular officials. Nothing in the treaty even remotely suggests that such a remedy is required, and this Court has no supervisory authority to impose an exclusionary rule remedy on the States.

A. The Court's Authority To Impose Exclusionary Rules On The States Is Highly Circumscribed

As this Court has recognized, exclusionary rules "impose[] significant costs" by "preclud[ing] consideration of reliable, probative evidence," which both "undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions." *Pennsylvania Bd. Of Probation & Parole* v. *Scott*, 524 U.S. 357, 364 (1998). Because of the high social costs of exclusionary rules, the Court has admonished that suppression should be "restricted to those areas where its remedial objectives are most efficaciously served," and that an "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *United States* v. *Payner*, 447 U.S. 727, 736 (1980) (internal quotation marks omitted).

The Court has fashioned and applied exclusionary rules to state criminal proceedings to protect federal *constitutional* rights. *Dickerson* v. *United States*, 530 U.S. 428, 444 (2000) (explaining application of *Miranda* to state courts on ground

that "*Miranda* announced a constitutional rule" based in the Fifth Amendment); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (exclusionary rule for evidence obtained in violation of the Fourth Amendment). *Payne* v. *Arkansas*, 356 U.S. 560, 568 (1958) (exclusionary rule for involuntary confessions under due process principles). These constitutionally based rules of suppression apply equally to proceedings in state court as to those in federal court. See *Dickerson*, 530 U.S. at 438.

In addition, the Court requires the exclusion of evidence when Congress itself has mandated suppression as the remedy for a statutory violation. See *United States* v. *Giordano*, 416 U.S. 505, 526-527 (1974) (requiring exclusion under 18 U.S.C. 2515). If the statute so provides, the rule would also bind the States under the Supremacy Clause. See, *e.g.*, 18 U.S.C. 2515 (no intercepted communication "may be received in evidence in any trial * * * before any court * * * of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter"). The Court has made clear however, that, as a general matter, non-constitutional violations do not warrant the suppression of evidence. See *United States* v. *Caceres*, 440 U.S. 741, 754-755 (1979) (because agent's violation of agency regulations did not contravene the defendant's constitutional rights in any respect, "our precedents enforcing the exclusionary rule to deter constitutional violations provide no support for the rule's application in this case").[11] And the Court

[11] Consistent with this Court's constitution-based approach to the exclusionary rule, the courts of appeal have repeatedly declined to order the suppression of evidence as a remedy for a violation of a federal statute or regulation that does not implicate constitutional rights, in the absence of a convincing showing that such a remedy was intended by Congress. See, *e.g.*, *United States* v. *Ware*, 161 F.3d 414, 424 (6th Cir. 1998) ("[s]tatutory violations, absent underlying constitutional violations or rights, are generally insufficient to justify imposition of the exclusionary rule"), cert. denied, 526 U.S. 1045 (1999); *United States* v. *Ani*, 138 F.3d 390, 392-393 (9th Cir. 1998) (violation of regulation governing opening of international letter mail should not be remedied through

recently emphasized that "[i]t is beyond dispute that [this Court] do[es] not hold a supervisory power over the courts of the several States." *Dickerson*, 530 U.S. at 438.

Sanchez-Llamas contends (04-10566 Pet. Br. 37) that the Court possesses the inherent power to suppress evidence "where the integrity of the criminal proceeding was jeopardized," which, he asserts, justifies the Court in fashioning a suppression remedy here. But the cases he cites do not support a broad power for the Court to create and impose on the States an exclusionary rule for Vienna Convention violations when no such rule is expressed in the treaty's text. See 04-10566 Pet. Br. 37-38 (discussing *Miller* v. *United States*, 357 U.S. 301, 313 (1958), *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957)).

In *Miller*, federal agents made a warrantless entry of a home to effect an arrest without knocking and announcing their presence. While no federal statute governed that action, the government conceded that the entry should be judged by the standards set out in the statute governing entries to execute a search warrant, 18 U.S.C. 3109. Because solely a federal prosecution was involved, and because Section 3109 does not itself provide for the exclusion of evidence, the Court's exclusion of evidence in that case is best understood as an exercise of supervisory power over the federal courts. *Miller*

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suppression); *United States* v. *Mason*, 52 F.3d 1286, 1289 n. 5 (4th Cir. 1995) (fact that Customs Service agent was not statutorily authorized to conduct search did "not rise to the level of a constitutional violation warranting suppression of the evidence"); *United States* v. *Benevento*, 836 F.2d 60, 69-70 (2d Cir. 1987) (violation of 31 U.S.C. 5317(b), requiring Customs agent to have reasonable suspicion to search luggage at port of entry for currency, did not warrant suppression), cert. denied, 486 U.S. 1043 (1988) (overruled on other grounds, *United States* v. *Indelicato*, 865 F.2d 1370 (2d Cir. 1989), cert. denied, 493 U.S. 811 (1989)); *United States* v. *Hensel*, 699 F.2d 18, 29-30 (1st Cir.) (Breyer, J.) (violation of regulation, statute, and rule of international law prohibiting search of foreign flag vessel without consent of flag state did not warrant suppression), cert. denied, 461 U.S. 958 and 464 U.S. 823 and 824 (1983).

therefore stands as no authority for the Court to create an exclusionary rule that is binding on the States.[12]

Similarly, as Sanchez-Llamas acknowledges (04-10566 Pet. Br. 39), the *McNabb-Mallory* line of cases, under which the Court excluded statements made by a suspect who was not presented to a magistrate promptly after his arrest, was adopted "[i]n the exercise of [the Court's] supervisory authority over the administration of criminal justice in the federal courts." *McNabb*, 318 U.S. at 341. That rule therefore does not—indeed, cannot—apply to state criminal proceedings. See *Dickerson*, 530 U.S. at 438; cf. *United States* v. *Alvarez-Sanchez*, 511 U.S. 350 (1994) (holding that 18 U.S.C. 3501(c), by which Congress modified, and perhaps repudiated, the *McNabb-Mallory* line of cases, is "not triggered" "[a]s long as a person is arrested and held only on state charges by state or local authorities"). Plainly, then, Sanchez-Llamas is incorrect when he relies on the "*Miller* and the *McNabb-Mallory* line of cases" to support the conclusion that "suppression is the appropriate remedy for an Article 36 violation" in state criminal proceedings. 04-10566 Pet. Br. 41.[13]

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[12] To the extent that violations of knock-and-announce principles may support the exclusion of evidence in state courts, cf. *Hudson* v. *Michigan*, cert. granted, 125 S. Ct. 2964 (2004) (No. 04-1360), it is because the "principle of announcement" "is an element of the reasonableness inquiry under the Fourth Amendment." *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995).

[13] Moreover, even in a federal criminal proceeding, the imposition, over the objection of the Executive Branch, of a remedy not expressly provided in the text of a treaty but designed to enforce the treaty would be a peculiarly inappropriate use of the judiciary's supervisory powers. The Executive Branch has the primary responsibility for ensuring compliance with the VCCR and is in the best position to assess what steps are appropriate to promote compliance and ensure reciprocal treatment of United States citizens abroad. Just as the supervisory authority of the courts must yield to a contrary congressional enactment in the domestic context, *Dickerson*, 530 U.S. at 437, the supervisory power would be inappropriate in light of a contrary executive branch determination concerning the steps necessary to ensure compliance with a treaty.

B. There Is No Basis For Construing The Vienna Convention As Incorporating An Implied Suppression Remedy

Because the Court cannot impose an exclusionary rule on the States as a matter of its supervisory authority, *Dickerson*, 530 U.S. at 438, the only basis for this Court to require suppression of petitioner's constitutionally-obtained statements in his state court criminal trial would be a finding that the Vienna Convention itself requires suppression. But it would be strange to attribute to the drafters of the Vienna Convention an intention to adopt a global exclusionary rule to apply whenever a receiving State failed to give the information required in Article 36(1)(b). Courts of other nations rarely excluded evidence (apart from involuntary confessions) from their criminal trials as a sanction for police conduct. See *Roper* v. *Simmons*, 125 S. Ct. 1183, 1226-1227 (2005) (Scalia, J., dissenting). Even in the United States, the exclusion of *voluntary* confessions because of the absence of constitutionally-based warnings was yet three years in the future at the time that the Vienna Convention was drafted in 1963. An exclusionary sanction for breach of a notification requirement would thus have been very novel indeed for an international conference of treaty negotiators. "There is no reason to think the drafters of the Vienna Convention had these uniquely American rights [to suppression of unwarned statements] in mind, especially given the fact that even the United States Supreme Court did not require Fifth and Sixth Amendment post-arrest warnings until it decided *Miranda* in 1966, three years after the treaty was drafted." *United States* v. *Lombera-Camorlinga*, 206 F.3d 882, 886 (9th Cir.) (en banc), cert. denied, 531 U.S. 991 (2000). See Craig M. Bradley, *Mapp Goes Abroad*, 52 Case W. Res. L. Rev. 375 (2001) (noting several countries that have adopted *Miranda*-type suppression rules only very recently); J. B. Dawson, *The Exclusion of Unlawfully Obtained Evidence: A Comparative Study*, 31 Int'l Comp. L.Q. 513, 534-535 (1982) (noting that exclusion

of voluntary statements on the basis of a right against self-incrimination was not recognized in England until 1979).[14]

1. Neither the text nor structure of the Convention suggests that the drafters intended suppression of evidence as a remedy for violations of Article 36(1)

"[T]he Vienna Convention itself prescribes no judicial remedy or other recourse for its violation." *United States* v. *Ademaj*, 170 F.3d 58, 67 (1st Cir.), cert. denied, 528 U.S. 887 (1999). There is nothing in the text of Article 36(1)(b) that suggests a suppression remedy. Indeed, there is no reference at all in Article 36(1)(b) to the collection or introduction of evidence. Thus, petitioner's argument is only that Article 36(1)(b) somehow implies a suppression remedy. As noted, international law rarely specifies private remedies, particularly not at the level of detail presumed by petitioner. See 2 Restatement (Third) of Foreign Relations pt. IX, introductory note at 339 ("Many obligations under international law benefit private persons * * * but the principal remedies for violation of these obligations are interstate only; international private remedies for violations of international law are still rare.").

Notably, the ICJ's decision in *Avena* did not purport to identify a specific remedy beyond review and reconsideration that the United States was required to afford, even under the ICJ's individual-rights-creating view of Article 36. The ICJ thus stated that it was "not to be presumed * * * that partial or total annulment of conviction or sentence provides the

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[14] The courts of appeals that have addressed the issue have uniformly concluded that suppression of evidence is not an appropriate remedy for a violation of any individual rights that may be created by Article 36. See, *e.g.*, *United States* v. *Minjares-Alvarez*, 264 F.3d 980, 986-987 (10th Cir. 2001); *Jimenez-Nava*, 243 F.3d at 198-200; *United States* v. *Page*, 232 F.3d 536, 540 (6th Cir. 2000), cert. denied, 532 U.S. 935, 1023, and 1056 (2001); *United States* v. *Chaparro-Alcantara*, 226 F.3d 616, 621-622 (7th Cir. 2000), cert. denied, 531 U.S. 1026 (2001); *United States* v. *Lombera-Camorlinga*, 206 F.3d at 885; *Li*, 206 F.3d at 61.

necessary or sole remedy" for the Article 36 violations that it found. *Avena*, 2004 I.C.J. para. 123 at 60. Indeed, the ICJ specifically cautioned that its decision did not, as Mexico unsuccessfully urged, mandate imposition of the domestic exclusionary rule in the case of Article 36 violations. *Id.* para. 127, at 61.

Sanchez-Llamas's contention that an exclusionary rule is implicit in the Vienna Convention requires a number of unwarranted inferential leaps. Most significantly, his contention (04-10566 Pet. Br. 45) that Article 36 "safeguard[s] a foreign national's privilege against self-incrimination" rests implicitly on the view that there is some nexus between a foreign detainee's invocation of his right to contact his consulate and a right to avoid self-incrimination or police interrogation. But there is no such connection. Indeed, it is highly unlikely that the Convention's drafters would have been attuned to self-incrimination concerns, since "[t]here is nothing comparable to the Fifth Amendment privilege in any supranational prohibition against compelled self-incrimination derived from any source, the privilege being 'at best an emerging principle of international law.'" *United States* v. *Balsys*, 524 U.S. 666, 695 n.16 (1998) (quoting Diane M. Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. Rev. 1201, 1259 (1998)). And *Miranda* provides no analogy here. *Miranda* protects the right against self-incrimination by prohibiting introduction of statements resulting from custodial interrogation when a suspect has not been warned of his right against self-incrimination. *Dickerson*, 530 U.S. at 435. The Vienna Convention contains no such prohibition—it provides a right to consular notification, not a right against self-incrimination or to be free from interrogation. See *Lombera-Camorlinga*, 206 F.3d at 886 ("the treaty does not link the required consular notification in any way to the commencement of police interrogation" or "to cease interrogation once the arrestee invokes his right" to have his consulate notified); *United States* v. *Ortiz*, 315

F.3d 873, 887 (8th Cir. 2002) ("the Vienna Convention does not require that interrogation cease until consular contact is made"), cert. denied, 538 U.S. 1042 (2003) and 540 U.S. 1073 (2003); *Jimenez-Nava*, 243 F.3d at 199 (same). Nor can such a requirement be read into the agreement because, unlike *Miranda*, a foreign national has no right to insist that his consulate provide him with any assistance whatsoever. That is entirely within the discretion of the sending State.

The fact that the sending State is under no obligation to provide assistance would, in most cases, make entirely speculative any determination whether the defendant had been prejudiced by his lack of awareness about Article 36. Any attempt to muster concrete evidence would create its own problems. Detainees would presumably need to obtain testimony or other evidence from the sending State's consular officers and employees to prove their claims, yet those officials are immune from the court's jurisdiction, Vienna Convention, art. 43, 21 U.S.T. at 104, 596 U.N.T.S. at 298, and "under no obligation to give evidence concerning matters connected with the exercise of their function," Vienna Convention, art. 44(3), 21 U.S.T. at 105, 596 U.N.T.S. at 298. Finally, even if the officials agreed to provide testimony, any judicial inquiry might easily embroil the courts in making rulings that could embarrass foreign governments (by concluding, for example, that testifying consular officers were not credible or that the consular post would not have provided meaningful consular assistance to its nationals). Thus, the remedy proposed by petitioner would end up undermining, rather than furthering, the central purpose of the Convention, "the promotion of friendly relations among nations." Vienna Convention, 21 U.S.T. at 79, 596 U.N.T.S. at 262; see *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968) (recognizing danger inherent in statutory scheme that "seems to make unavoidable judicial criticism" of some nations).

2. *A suppression remedy would be inconsistent with the implementation practices of the State parties to the Convention*

Any suggestion that interrogation of a foreign national must stop until the consulate has been notified and made a determination whether to provide assistance (and, if so, to make arrangements for assistance to be provided) is wholly inconsistent with the practice of the States that are parties to the treaty, including approved practices in the United States. See, *e.g.*, Vienna Convention of the Law of Treaties, art. 31(3)(b), 1155 U.N.T.S. at 340 (emphasizing importance of "subsequent practice in the application of the treaty" in interpreting a treaty's meaning). The State Department, for example, informs police that foreign nationals should be "advised of the possibility of consular notification by the time the foreign national is booked for detention," U.S. Dep't of State, Consular Notification and Access 20 (A552), which may, of course, happen after interrogation of the foreign national has given police a basis for making a charge, and the State Department indicates that notice to the consulate, if requested, would "normally * * * have been made within 24 hours, and certainly within 72 hours" of the request, *ibid.*, by which time interrogation will be completed in many, if not most, cases. Such guidelines provide far more time for notification of consular officials than would be allowed if such notification were intended to ensure consular assistance could be provided before the detainee made a knowing decision whether to cooperate in police interrogation. See *id.* at 47-49 (A579-A581) (bilateral mandatory notification agreements recognizing that notice to the consulate could take a matter of days).

The practice of other signatory nations makes the disconnect between consular notification and limitations on interrogation even more obvious. The idea that the receiving State's failure to inform a foreign national of his ability to seek consular assistance would lead to the exclusion of the national's

statements from trial would have come as a considerable surprise to many of the participants at the diplomatic conference, whose criminal justice systems were (and are) quite different from our own. For example, several parties to the Vienna Convention do not permit access to foreign detainees by their consular officials during the initial period of interrogation. According to the Declaration of Assistant Secretary of State Harty, submitted in the *Avena* matter, "France does not permit U.S. consular officials to have access to U.S. citizen detainees while they are in police custody." Harty Decl. 9 (A385). Similarly, several countries "do not permit consular access until at least initial questioning is completed" (China, Italy, Panama), or, in other cases, during an initial period of "incommunicado detention" (Argentina, Belgium, and Spain). *Id.* at 9-10 (A385-A386). Indeed, in many of these countries "suspects can be held by the police for substantial periods of time without having access even to legal counsel." Prof. Thomas Weigend Decl. in *Avena* 3 (A363) (citing Argentina, China, France, and Japan). See also *id.* at 5 (A365) (noting that suppression of reliable, voluntary statements as a form of retaliation for violating procedural rules "does not * * * comport with legal systems operating under * * * the 'inquisitorial' mode of fact-finding" in which "it is the court's responsibility to find the truth regardless of the activity or passivity of the prosecution and the defense").

3. The Senate did not intend for the Court to adopt a suppression remedy for Vienna Convention violations

In view of Congress's response to *Miranda* and other decisions of this Court authorizing the exclusion of voluntary confessions in circumstances with a clear nexus between the right and the remedy, it is virtually inconceivable that the Senate would have given its advice and consent to the Vienna Convention if it had understood that a breach of the consular-notification requirement would result in the exclusion of voluntary confessions. Two years after the *Miranda* decision—

and just one year before giving its advice and consent to the ratification of the Vienna Convention—Congress enacted 18 U.S.C. 3501, which was intended to overrule *Miranda* and restore a pure voluntariness standard for the admissibility of confessions in federal court. *Dickerson*, 530 U.S. at-435-436. Notably, the Senate Report on Section 3501 was also particularly critical of the exclusionary rule adopted in *Mallory*, which Sanchez-Llamas cites (04-10566 Pet. Br. 37-38) as an example of the Court's inherent authority to append an exclusionary rule to a federal statute, but which the Senate sought to "abrogat[e]." S. Rep. No. 1097, 90th Cong., 2d Sess. 40 (1968). See *id.* at 38 (citing "need[] to offset the harmful effects of the *Mallory* case").

In place of *Miranda* and *Mallory*, Congress prescribed a test that made voluntariness the linchpin of admissibility, after consideration of the totality of the circumstances, with the specific goal of avoiding inflexible rules. See 18 U.S.C. 3501(a).[15] It can hardly be believed that the Senate, only a year later, voted without any comment to establish a different inflexible rule that would exclude an otherwise voluntary confession in the context of an underlying "right" to consular notification, not a right to be free of involuntary self-incrimination. It is more likely that the Senate would have intended that a foreign national's "lack [of] a basic understanding of the American legal system" and "[in]ability to communicate in English" (N.Y.C. Bar Ass'n Amicus Br. 17) would be factors in answering the more fundamental question whether his statement was voluntary.

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[15] This Court held in *Dickerson* that Section 3501(a) could not displace *Miranda*'s constitutionally based rule. That holding does not undercut the relevance of Section 3501 in assessing the Senate's likely understanding that Article 36 would not threaten the admissibility of voluntary confessions in federal and state prosecutions or the validity of Section 3501 in overriding the supervisory rule adopted in *Mallory*.

III. THE VIENNA CONVENTION DOES NOT PRECLUDE APPLICATION OF PROCEDURAL DEFAULT PRINCIPLES

Even if Article 36 did create individually enforceable rights, and even if those rights were enforceable in the context of the national's criminal trial, the Convention would still not preclude Virginia from applying its procedural default rules to Bustillo's Vienna Convention claim. Virginia's long-established rule that a defendant's failure to raise a claim at trial or on direct review bars the defendant from presenting the claim on collateral review is an adequate and independent ground that will support a state habeas court's judgment. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Because, "[i]n the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional," this Court "has no power to review a state law determination that is sufficient to support the judgment." See *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). Bustillo's sole argument in this Court for avoiding Virginia's procedural bar rule is that the Vienna Convention precludes application of that doctrine to his Article 36 claim. That argument lacks merit.

A. This Court's Decision In *Breard* Is Controlling And Should Not Be Overturned

This Court, in fact, already considered and resolved that issue of treaty interpretation in *Breard*, in which, as here, the defendant failed to raise a Vienna Convention claim at trial or on appeal. The Court rejected as "plainly incorrect" the notion that the Vienna Convention "trumps the procedural default doctrine," and held, to the contrary, that the procedural rules of the forum State, including rules on procedural default, govern implementation of the Vienna Convention. *Breard*, 523 U.S. at 375. As the Court noted, "although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply." *Id.*

at 376. Moreover, while acknowledging both a preliminary ICJ order related to the defendant and the principle that courts in the United States should give "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [it]," the Court indicated in *Breard* that such "respectful consideration" was conditioned by the background international law principle that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* at 375.[16]

As the Court has noted, that background principle "is embodied in the Vienna Convention itself," *Breard*, 523 U.S. at 375, as Article 36(2) expressly provides that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State," *ibid.* (quoting Vienna Convention, art. 36(2)). Because "[i]t is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas," this Court concluded that Article 36(2) reinforced, rather than defeated, the principle that domestic procedural default rules apply with regard to forfeited Vienna Convention claims. *Ibid.* Accordingly, the Court in *Breard* held that, having "failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia," Breard "cannot raise a claim of violation of those rights now on habeas review." *Id.* at 375-376.

Petitioner urges the Court to revisit and overrule its *Breard* holding on the grounds that the ICJ, in *LaGrand* and

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[16] At the time of the Court's *Breard* decision, the ICJ had not yet issued its decisions in *LaGrand* or *Avena*. The ICJ had, however, issued an order "requesting that the United States 'take all measures at its disposal to ensure that * * * Breard is not executed pending the final decision in these proceedings.'" 523 U.S. at 374. In spite of the ICJ's order, the Court issued an order denying any relief to Breard, finding that his argument that the Vienna Convention trumped state procedural bar rules "plainly incorrect." *Id.* at 375.

Avena, disagreed, and the President later directed the States to take actions to implement the *Avena* decision. The President's decision to implement the ICJ's *Avena* judgment in the cases of those individuals addressed in *Avena* does not, contrary to petitioner's understanding (05-51 Pet. Br. 44), have any relevance to his case. The President's decision to implement the *Avena* judgment was not based on an interpretation of the Vienna Convention. Rather, it was based on the President's constitutionally based foreign affairs power, *American Ins. Ass'n*, 539 U.S. at 414, and other treaties and statutes.[17] And a determination to comply with an ICJ decision does not require agreement with the ICJ's treaty interpretation. Indeed, the President's determination was made contemporaneously with the United States' brief amicus curiae in *Medellin*, in which the United States specifically disputed the correctness of the interpretation of Article 36 that underlay the ICJ's *Avena* decision. The President's determination offers no basis for this Court to revisit its earlier holding as to Article 36(2)'s meaning.

Nor do the ICJ's *LaGrand* and *Avena* decisions warrant reconsideration of the Court's holding in *Breard*. The ICJ reasoned that applying the procedural default rule to bar consideration of a challenge to a defendant's conviction and sentence violates Article 36(2)'s requirement that laws of the forum state "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *LaGrand*, 2001 I.C.J. para. 91, at 497-498. But this Court already considered Article 36(2)'s "full effect" language

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[17] The President's decision to comply with the ICJ decision rested on his authority to implement the United States' obligations under United Nations Charter (which is itself a ratified treaty), including the undertaking to comply with the judgment of the ICJ in cases to which the United States is a party, United Nations Charter, art. 94, 59 Stat. 1051, and his constitutional and statutory (under the United Nations Participation Act, 22 U.S.C. 287, 287a) responsibility to direct all functions connected with the participation of the United States in the United Nations, including the ICJ.

in *Breard* and concluded, correctly, that it does not "trump[] the procedural default doctrine." 523 U.S. at 375. Application of the procedural default rule to an Article 36 claim no more prevents "full effect" from being given to the Convention's purposes than application of the same rule prevents full effect from being given to the purposes of constitutional rights, such as the right against compelled self-incrimination. See *Breard*, 523 U.S. at 376 (AEDPA procedural rule governs "Breard's ability to obtain relief based on violations of the Vienna Convention * * * just as any claim arising under the United States Constitution would be"); *Ylst* v. *Nunnemaker*, 501 U.S. 797, 801 (1991) (procedural default applies to *Miranda* claims); *Wainwright* v. *Sykes*, 433 U.S. at 87-88 (procedural default applies to voluntariness claims).

The ICJ's decisions in *LaGrand* and *Avena* are clearly not binding on this Court in this case. Quite apart from this Court's independent authority to declare the meaning of the treaty, Article 59 of the Statute of the ICJ says that its decisions are binding only "between the parties and in respect of that particular case." Stat. of the ICJ, 59 Stat. 1062. Moreover, the United States' undertaking under Article 94 of the United Nations Charter, 59 Stat. 1051, to comply with a decision of the ICJ in a dispute to which it is a party, is to comply with the ICJ's ultimate resolution of the dispute, not to accept all the reasoning that leads to that resolution. In this case, the ICJ's reasoning is not persuasive. In *LaGrand*, the ICJ's reasoning on this point was no more than a mere statement that, "the procedural default rule prevented [counsel] from attaching any legal significance to the fact * * * that the violation of * * * Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention," and, therefore, "the procedural default rule had the effect of preventing 'full effect [from being] given'" to Article 36(1)(b). *LaGrand*, 2001 I.C.J. para. 91, at 497-498. By that reasoning, any procedural rule that pre-

vented a court from deciding the substance of a Vienna Convention claim—such as a State's statute of limitations for seeking collateral review—would have to be set aside as inconsistent with Article 36(2). As this Court held in *Breard*, 523 U.S. at 375, there must be a far more "clear and express statement" before a treaty will be construed to require the forum State to set aside all such procedural rules—particularly when, as here, the Convention's own terms provide that its rights must be exercised "in conformity with the laws and regulations of the receiving State." Vienna Convention, art. 36(2).

B. Nothing About Vienna Convention Claims Takes Them Outside The Procedural Bar Rule

Bustillo alternatively contends (05-51 Pet. Br. 39-42) that Vienna Convention claims are different from most challenges to a criminal trial because the facts and issues can only be fully developed on collateral review. Petitioner relies on *Massaro* v. *United States*, 538 U.S. 500 (2003), in which the Court held, as a matter of its supervisory authority, *id.* at 504, that ineffective assistance of counsel claims "may be brought in the first instance in a timely motion in the district court under [Section] 2255 * * * whether or not the petitioner could have raised the claim on direct appeal," *ibid.* Consular notification claims, however, are markedly different from ineffective assistance of counsel claims, and the rationale that supports *Massaro* does not support a similar rule here.

If a defendant's Vienna Convention claim seeks, as Sanchez-Llamas does, suppression of evidence, the issues (assuming the availability of the remedy) would be nearly indistinguishable from a motion to suppress under *Miranda* or *Mapp*. It would be far more efficient to litigate that evidentiary issue before trial, rather than on habeas review, when any relief would require yet another round of litigation. If, as in Bustillo's case, the claim concerns delay in obtaining assistance from the consulate that could have produced evi-

dence at trial, again, it would be far better to litigate the question of a violation *at trial*, when a continuance would allow a (belatedly informed) consulate to provide any assistance it might be willing to offer.

A Vienna Convention claim is wholly unlike a claim of ineffective assistance of counsel. Trial counsel who performed deficiently cannot reasonably be expected to note his deficient performance by way of a contemporaneous objection or to make a record showing that his unprofessional actions or omissions prejudiced his client. As this Court explained, even if the defendant has new counsel on direct appeal, it would be judicially "inefficient" to require new counsel to raise for the first time ineffective assistance of counsel claims, as such a requirement would "create perverse incentives for counsel on direct appeal" to assert ineffectiveness claims "regardless of merit"; compel appellate counsel "to raise the [ineffectiveness] issue before there has been an opportunity fully to develop the factual predicate for the claim"; require initial consideration of ineffectiveness claims in an appellate forum "not best suited" to assess undeveloped facts; and create an "awkward" relationship between a defendant's trial and appellate counsel that could hamper his appeal. *Massaro*, 538 U.S. at 504-506. None of those considerations applies to consular notification claims.

An unstated premise of Bustillo's argument that consular notification claims should be treated like ineffective assistance of counsel claims for purposes of the procedural bar appears to be that the foreign national will regularly be unaware of his Vienna Convention claim at trial, but will discover it later. Even if a foreign national may not be personally aware that he is free to contact his consulate to ask for assistance, trial counsel should be in a position to advise his client of that right and to object to any violation of it, as the preserved claims in No. 04-10566 demonstrate. Relying on counsel to identify a Vienna Convention claim is no different from relying on counsel to raise potential constitutional claims

that are unknown to the defendant, including claims—such as one under *Miranda*—that the government failed to provide a detainee with required information about his rights.

A rule that allowed foreign national defendants to withhold their Vienna Convention claims until collateral review would encourage tactical gamesmanship that should be discouraged. For example, defense counsel with a plausible but untested defense might be tempted to delay seeking assistance from his client's consulate when the assistance might help but could also harm the defense, with knowledge that, in the event of a conviction, the consulate could be contacted and any helpful evidence could then be used to demonstrate prejudice from the Vienna Convention violation. Virginia's procedural bar rule reasonably, and permissibly, prevents such tactical behavior.

CONCLUSION

The judgments of the Virginia Supreme Court and the Oregon Supreme Court should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

A. The Supremacy Clause to the Constitution, U.S. Const. Art. 6, Cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

B. The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, provides in its Preamble and Article 36:

> The States Parties to the present Convention,
>
> Recalling that consular relations have been established between peoples since ancient times,
>
> Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
>
> Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

* * * * *

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to

the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

C. The Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487, provides in pertinent part:

The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has

been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

* * * * *

D. Article 94 of the United Nations Charter, June 26, 1945, 59 Stat. 1033, 1051, provides:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

E. Article 59 of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1062, provides:

> The decision of the Court has no binding force except between the parties and in respect of that particular case.

F. The United Nations Participation Act, 22 U.S.C. 287, 287a, provides:

Section 287. Representation in Organization

(a) Appointment of representative; rank, status, and tenure; duties

The President, by and with the advice and consent of the Senate, shall appoint a representative of the United States to the United Nations who shall have the rank and status of Ambassador Extraordinary and Plenipotentiary and shall hold office at the pleasure of the President. Such representative shall represent the United States in the Security Council of the United Nations and may serve ex officio as representative of the United States in any organ, commission or other body of the United Nations other than specialized agencies of the United Nations, and shall perform such other functions in connection with the participation of the United States in the United Nations as the President may, from time to time, direct.

(b) Appointment of additional representatives' rank, status, and tenure; duties; reappoint, went unnecessary

The President, by and with the advice and consent of the Senate, shall appoint additional persons with appropriate titles, rank, and status to represent the United States in the principal organs of the United Nations and in such organs, commissions, or other bodies

as may be created by the United Nations with respect to nuclear energy or disarmament (control and limitation of armament). Such persons shall serve at the pleasure of the President and subject to the direction of the Representative of the United States to the United Nations. They shall, at the direction of the Representative of the United States to the United Nations, represent the United States in any organ, commission, or other body of the United Nations, including the Security Council, the Economic and Social Council, and the Trusteeship Council, and perform such other functions as the Representative of the United States is authorized to perform in connection with the participation of the United States in the United Nations. Any Deputy Representative or any other officer holding office at the time the provisions of this Act, as amended, become effective shall not be required to be reappointed by reason of the enactment of this Act, as amended.

Section 287a. Action by representatives in accordance with Presidential instructions; voting

The representatives provided for in section 287 of this title, when representing the United States in the respective organs and agencies of the United Nations, shall, at all times, act in accordance with the instructions of the President transmitted by the Secretary of State unless other means of transmission is directed by the President, and such representatives shall, in accordance with such instructions, cast any and all votes under the Charter of the United Nations.

Supreme Court, U.S.
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Nos. 04-10566 & 05-51

In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,
Petitioner,
v.
STATE OF OREGON,
Respondent.

MARIO A. BUSTILLO,
Petitioner,
v.
GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
to the Supreme Courts of Oregon and Virginia

BRIEF OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

(1) Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States?

(2) Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24 1963, 21 U.S.T. 77, 100-101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or because the treaty does not create individual rights?

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